IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 27TH JUNE 2007 / 6TH ASHADHA 1929

SA.No. 42 of 1994(E)

AS.41/1983 of SUB COURT,KOTTARAKKARA
OS.189/1980 of MUNSIFF'S COURT, KOTTARAKKARA
.....

APPELLANT: ADDL.3RD RESPONDENT:

PADMAKUMARI AMMA (D/O.CHELLAMMA),
PERUMKULLU PUTHEN VEEDU, PERUMKULATHU MURI,
KULAKKADA VILLAGE.

BY ADV. SRI.TKM.UNNITHAN
SRI.T.J.JAYARAM
SRI.P.G.GANAPPAN

RESPONDENTS:APPELLANT:PLAINTIFF AND ADDL.4TH RESPONDENT:
----

1. **KUNJUKUTTY AMMA SAROJINI AMMA, PUTHENPURA VADAKKATHIL VEEDU, PERUMKULATHU MURI, KULAKKADA VILLAGE.**

2. **VIJAYAKUMAR AMMA (D/O.CHELLAMMA), PERUMKULLU PUTHEN VEEDU, PERUMKULATHU MURI, KULAKKADA VILLAGE.**

BY ADV. SRI.C.V.VASUDEVAN)
SMT.V.SUJATHA)
SRI.K.G.DEVARAJAN) for R1

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 27/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON C.M.P.NO.53/1994 IN S.A.NO.42/1994

DISMISSED

27/06/2007 **SD/- M.SASIDHARAN NAMBIAR, JUDGE**

/TRUE COPY/

KSS

M.SASIDHARAN NAMBIAR, J.

.....

S.A.No. 42 OF 1994

.....

DATED THIS THE 27th DAY OF JUNE, 2007

JUDGMENT

Third respondent in A.S.41 of 1983 who is one of the legal heirs of original respondent impleaded in the first appeal is the appellant. First respondent is the plaintiff in the suit and appellant in the first appeal. Second respondent is the 4th respondent, the other legal heir of deceased defendant. The suit was filed seeking a decree for declaration of title and recovery of possession. Disputed property is a narrow strip of land which lies in between the admitted property of appellant and respondent having an extent of three cents and marked by the Commissioner in Ext.C2 plan in blue shade. The property of appellant lies to the south and is comprised in Survey No.99/8. The property of first respondent lies to the north and is in Survey No.99/6. The disputed portion falls in Survey No.99/6. Respondent sought a decree for declaration of his title and recovery of possession contending that it forms part of her property. The defendant contended that the disputed portion forms part of his property and is in his possession and therefore first respondent is not entitled to the decree for recovery of

possession.

2. Learned Munsiff on the evidence upheld the title of first respondent over the disputed portion, but denied the decree holding that defendant had perfected her title by adverse possession. It was challenged before first appellate court. First appellate court, as per judgment dated 25.10.1989, granted a decree for recovery of possession holding that first respondent has title to the property. It was challenged before this court in CMA 119 of 1990. This court, confirming the findings on title as well as the correctness of the demarcation of the property in Ext.C2 plan, held that the question of adverse possession was not considered by the first appellate court. First appeal was therefore remanded with a direction to consider whether defendant has perfected his title by adverse possession.

3. Learned Sub Judge reappreciated the evidence and held that defendant had not perfected his title by adverse possession and granted a decree in favour of first respondent for recovery of possession after declaring the title. It is challenged in the second appeal.

4. The second appeal was admitted formulating the following substantial questions of law:

i) Whether first appellate court was right in holding that the claim of adverse possession pleaded by defendant shall be deemed to be given up, in the light of the directions of this court in CMA 119 of 1990 and in the absence of material to show that the plea was given up.

ii)Whether first appellate court was correct in holding that defendant did not perfect his title by adverse possession.

5. Learned counsel appearing for appellant vehemently argued that even when first respondent was examined as PW1, her evidence was that she had an intention to get the disputed property from 1122 ME onwards and when the defendant was examined as DW1, he had not given up the claim based on adverse possession and therefore first appellate court was not correct in holding that appellant had given up the claim for title based on adverse possession. It was argued that when this court directed first appellate court to consider that question and defendant was claiming that title of first respondent is barred by adverse possession and limitation, first appellate court should not have held that the plea was given up unless it was expressly given up. Learned counsel also argued that from the evidence of PW1, it is clear that plaintiff has not been in possession of the

disputed property from 1122 ME onwards and it establishes that defendant has perfected his title by adverse possession and therefore the decree granted is unsustainable.

6. Learned counsel appearing for first respondent argued that first appellate court has appreciated the evidence in the proper perspective and found that when the Commissioner inspected the property in 1979 to submit Ext.C1 report, there was a demarcation boundary through AB line which was subsequently shifted to BC line and first appellate court on the evidence rightly found that shifting was done only subsequent to Ext.B1 report and if so the defendant could claim possession only thereafter and as 12 years period did not expire from that date, the claim for adverse possession is not sustainable. It was argued that, that factual finding cannot be interfered in exercise of the powers of this court under Section 100 of Code of Civil Procedure and therefore appeal is only to be dismissed.

7. This court in CMA 119 of 1990 had already upheld the title of first respondent to the disputed three cents which lies to north of AB line and comprised in Survey No.99/6 as well as the correctness of Ext.C2 plan. First appellate court was directed to consider the plea of adverse possession. There is force in the

submission of learned counsel appearing for appellant that appellant did not give up the plea of adverse possession as it was to consider the correctness of the said plea the first appeal was remanded. But the question is whether apepllant has succeeded in establishing that defendant has perfected his title by adverse possession.

8. When the suit is for recovery of possession based on the strength of title it is not the burden of the plaintiff to prove that plaintiff has been in possession of the property within a period of 12 years prior to the institution of the suit, as was the case with Section 141 of Limitation Act 1908. After the enactment of Limitation Act 1963, when the suit is for recovery of possession on the strength of title, plaintiff is entitled to get decree on establishing the title, unless defendant establishes that the title is barred by adverse possession and limitation. That burden is definitely on the defendant. Learned Sub Judge appreciated the evidence in the proper perspective. Relying on Ext.B1 report submitted by the Commissioner earlier before the criminal court, where the Commission was appointed, it was found that the Commissioner could find the survey stones on point B and point A as well as the demarcating boundary through AB line. When

the Commissioner inspected to submit Ext.C1 report and C2 plan, that boundary was shifted further towards north through BC line. Learned Sub Judge, on appreciating the evidence, found that shifting of the boundary line to BC line from AB line could have been done only after submission of Ext.B1 report and if that be so, it could only be within a period of 12 years prior to the institution of the suit and therefore possession of the defendant can only be within a period of 12 years before the institution of the suit. It is on that basis first appellate court held that defendant did not perfect his title by adverse possession. Learned Sub Judge also appreciated the evidence of DW2 who was examined by appellant to prove adverse possession and found that the witness came to that locality only 8 years prior to the date of examination. First appellate court also found that evidence of DW3 could not be relied on. First appellate court, on these basis entered a factual finding that defendant did not establish that his title was perfected by adverse possession. That factual finding cannot be interfered by reappreciating the evidence as has been sought for by learned counsel appearing for appellant. Even if the factual finding rendered by the first appellate court is erroneous, this court cannot reappreciate the

evidence and substitute its finding to the finding of the first appellate court. Powers under Section 100 cannot be invoked for that purpose. As first appellate court entered a factual finding, on appreciation of evidence that defendant did not perfect the title by adverse possession, first respondent is entitled to the decree for recovery of possession granted. There is no merit in the appeal. Appeal is dismissed.

M.SASIDHARAN NAMBIAR, JUDGE

lgk/-